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NO. 80-532
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and A. J. TAYLOR, its Secretary, PETITIONERS

v.

THE FLORIDA NURSING HOME ASSOCIATION, et al., RESPONDENTS

AMICUS BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AND THE STATE OF MINNESOTA WITH THE STATES OF DELAWARE, GEORGIA, INDIANA, KANSAS, MAINE, MARYLAND, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OHIO, OREGON, RHODE ISLAND, SOUTH DAKOTA, UTAH, AND WISCONSIN AND COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA IN SUPPORT OF THE STATE OF FLORIDA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTEREST OF THE AMICI

The Commonwealth of Massachusetts, the State of Minnesota and the other amici states submit this amicus brief in support of the State of Florida, Department of Health and Rehabilitative Services' (Florida DHRS) petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in the case of Florida Nursing Home Ass'n. v. Page, 616 F.2d 1355 (5th Cir. 1980). The amici states wish to express to the Court their belief that the Fifth Circuit decision that Florida

waived its Eleventh Amendment immunity to suit in federal court constitutes a grave departure from the principles of sovereign immunity recognized by this Court.

The imposition of retroactive monetary relief against the state authorized by the Fifth Circuit represents an unprecedented diminution of the constitutional immunity afforded the states by the Eleventh Amendment. Moreover, the amici states intend to contrast the Fifth Circuit's opinion in this case with the decisions of this Court which give precise guidance to federal courts faced with claims by private parties for retrospective monetary relief against the states. In so doing, the amici states seek to expose the erroneous reasoning which has led the Fifth Circuit to impose on Florida the unjustified burden of amenability to an award of retrospective monetary relief in federal court. Should other federal district courts adopt this faulty rationale, the amici states could also be held responsible for payment of retrospective monetary damages in cases where health care providers successfully challenge a state's Medicaid reimbursement plan. Furthermore, the rationale adopted by the Fifth Circuit in this case could be applied to a large number of other cooperative federal-state programs of shared financial responsibility. As those who would bear the tremendous fiscal hardship which would be generated by

judicial imposition of retrospective monetary relief, the amici states are uniquely qualified to convey these concerns to the Court.

SUMMARY OF THE ARGUMENT

In the initial section of their argument, the amici states argue that Congress has expressed its intention not to require states that participate in the Medicaid program to abrogate their Eleventh Amendment immunity. Although Congress did enact a provision requiring states participating in the inpatient hospital care segment of the Medicaid program to consent to suit by providers of such services, it later rescinded the requirement retroactively. Because Congress never required states to consent-to-suit by providers of long-term nursing care services under the Medicaid program, and because it repudiated a waiver provision briefly addressed to suits by providers of inpatient hospital services, the intention of Congress not to abrogate the Eleventh Amendment immunity of states participating in the Medicaid program is firmly established. Moreover, the amici states contend that the Florida DHRS, through its contract with providers of long-term nursing care services, did not waive Florida's Eleventh Amendment immunity by agreeing to comply with federal law. The agreement to comply with federal law does not constitute an

unequivocal statement or an overwhelming implication of a definitive intention to waive Florida's Eleventh Amendment immunity. Even if it does, the Florida DHRS lacks authority to waive Florida's Eleventh Amendment immunity because the Florida Constitution directs that only the Legislature may take such action.

The amici states, in the second section of their brief, direct the Court's attention to the effect of the Court's decision in Harris v. McRae, __ U.S. __ (1980), 100 S.Ct. 2671 (1980), on the Fifth Circuit's decision in this case. In McRae, the Court held that because Title XIX creates a cooperative program of federal-state financial responsibility for the cost of providing medical services to Medicaid patients, participating states cannot be required to reimburse health care providers for services for which federal contributions are unavailable. Federal reimbursement to assist Florida in making payments for the retroactive monetary relief approved by the Fifth Circuit is not available. Therefore, in accordance with the rule announced in McRae, Florida has no substantive liability under Title XIX for payment of retrospective monetary relief to health care providers.

ARGUMENT

I. The Eleventh Amendment: Abrogation By Congress And Waiver By The States.

This Court has indicated that before a judicial determination can be made that a state is amenable to suit in federal court by private parties seeking retrospective monetary relief, two questions must be addressed. First, whether Congress, by statute, has expressed its intention to abrogate the Eleventh Amendment immunity of states that participate in a federal program, and second, whether a state by participating in a program established by Congress or by other deliberate action has consented to abrogation of Eleventh Amendment protection. Edelman v. Jordan, 415 U.S. 651, 672 (1974). See also Employees v. Department of Public Health and Welfare, 411 U.S. 279, 285 (1973); Parden v. Terminal Railway Company, 377 U.S. 184, 191-93 (1964).

Congress not only has power under Article I of the Constitution to regulate selected state activities, it may also subject states to suit by private litigants in federal

court for non-compliance with statutory requirements.[1/] Parden, 377 U.S. at 195. But, if it intends to annul the Eleventh Amendment immunity of the states, Congress must express its determination in "clear language that the constitutional immunity [has been] swept away." Employees, 411 U.S. at 285. In the absence of an explicit provision subjecting states to suit by private parties in federal court for violation of federal regulations, the Court has refused to sanction the award by federal courts of retrospective monetary relief against the states. Edelman, 415 U.S. at 652; Employees, 411 U.S. at 285.

1/ This congressional power, however, is not unconditional. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court concluded that the Commerce Clause did not empower Congress to regulate the wages and hours of state employees through the Fair Labor Standards Act. The 1974 amendments to FLSA contained a congressional directive rendering state employers subject to private enforcement actions. The Court held that establishment of wages and hours for state employees was so central to the operation of state government that Congress' attempt to regulate such matters through the Commerce Clause was invalid.

Just as there must be a manifest congressional intention to abrogate Eleventh Amendment immunity before the protection may be eliminated, a state that decides to waive its Eleventh Amendment immunity must do so in a clear and unmistakable manner. Edelman, 415 U.S. at 673. Once Congress has expressed its intention to annul Eleventh Amendment immunity in the context of a program which regulates state activities in a selected area, the participation of states in the regulated activities indicates their consent to abrogation of Eleventh Amendment protection. Id. at 672; Parden, 377 U.S. at 196. But, when Congress has not authorized enforcement actions against the state by private parties in federal court, state participation in a federal program does not constitute waiver by the state of its Eleventh Amendment immunity. Edelman, 415 U.S. at 672. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, [this Court] will find waiver only where stated 'by the most express language or by such overwhelming implications in the text as [will] leave no room for any other reasonable construction.'" Id. at 673, quoting from Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

A. Congress Has Expressed Its Intention Not To Subject Participating States To Suit In Federal Court.

Congress enacted Title XIX of the Social Security Act, 42 U.S.C. §§1396a-k (1976), for the purpose of providing cost-effective health care services to indigent persons in need of medical care. The Medicaid program, as Title XIX is commonly known, is a cooperative state-federal system of financial participation in state expenditures for health care services which seeks to encourage the improvement of state welfare programs by making federal financial participation available to the states. See Harris v. McRae, __ U.S. __, __ (1980), 100 S.Ct. 2671, 2684 (1980). The program is administered by the states in accordance with federal law and regulations promulgated by the Department of Health and Human Services.

States are required by 42 U.S.C. §1396a(a)(13)(E) to reimburse providers of skilled nursing care "on a reasonable cost related basis" under a plan which, after being developed by the states, must be "approved and verified by the Secretary" of Health and Human Services (Secretary). Somewhat different standards must be met by the states for reimbursing other health care providers such as hospitals and rural health clinics, and these

methodologies must also be approved by the Secretary. 42 U.S.C. §§ 1396a(a)(13)(D) (State plans must provide reimbursement for "the reasonable cost of inpatient hospital services" and must be "reviewed and approved by the Secretary.") and (F) (State plans must provide reimbursement for services dispensed by rural health clinics to Medicaid recipients by paying "100 percent of costs which are reasonable and related to the cost of furnishing such services or based on such other tests of reasonableness, as the Secretary may prescribe.").

As originally enacted, Title XIX did not include any provision which could be construed as a requirement that states must waive their Eleventh Amendment immunity as a condition of participation. However, in 1975, Congress was confronted with myriad complaints from health care service providers that some states were implementing inadequate Medicaid reimbursement programs which had not been approved by the Secretary. The providers objected that because the Eleventh Amendment precluded suits in federal court to recover monetary relief from non-complying states, providers had no recourse for recovering the reasonable costs of providing health care services to Medicaid patients.

Late in 1975, Congress acceded to the vigorous pleas of the providers and added 42 U.S.C. §1396a(g) to Title XIX which required the states to amend their Medicaid

plans to include consent to suit in the federal courts by hospitals[2/] over disputes relating to the payment of reasonable costs for health care services provided to Medicaid patients.[3/]

This statutory requirement was in force for only a few months, however, when the Congress realized it had been mistaken in its attempt to coerce states to waive their sovereign immunity. The House passed repealing legislation in May, 1976, and the Senate soon followed suit. Then, on October 18, 1976, the President signed Pub. L. No. 94-552 which repealed the mandatory waiver of immunity provision as of January 1, 1976, the date on which it originally took effect. Both the Senate

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2/ Section 1396a(g) did not require that states consent to suits by nursing homes or other health care providers.

3/ Section 111 of Pub. L. No. 94-182, which contains the mandatory waiver provision, also provided that, if a state failed to amend its Medicaid plan to include a consent-to-suit stipulation, the amount of federal funds payable to the non-complying state would be reduced by ten percent.

and the House reports[4/] which accompanied the repealing legislation voiced concern about the urgent nature of the problems generated by the mandatory waiver of Eleventh Amendment immunity. In addition to discussing the serious questions concerning the constitutionality of the provision, the House Report in particular observed that the waiver would produce extremely burdensome lawsuits which would "make efficient program administration virtually impossible." H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. (1976) at 4.

Congress' brief experiment with peremptory waiver of the states' Eleventh Amendment immunity in cases brought by hospitals to challenge Medicaid reimbursement plans was quickly abandoned in light of the highly disruptive effect such a requirement would have had on the expeditious development and implementation of effective state Medicaid programs. Upon reviewing the rationale advanced in support of the mandatory Eleventh Amendment immunity waiver provision, Congress rejected it and specifically adopted a policy reaffirming the

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4/ H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. (1976); Sen. Rep. No. 94-1240, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code Cong. & Ad. News 5648.

application of Eleventh Amendment protections for states which participate in the Medicaid program.

The intent of Congress is evident. When it enacted the provision waiving the Eleventh Amendment immunity of states participating in the Medicaid inpatient hospital care program, Congress declined to impose a similar requirement on states involved in the long-term nursing care segment of the Medicaid program. Then, by retroactively repudiating the waiver provision, Congress evinced its intention not to remove the Eleventh Amendment immunity of states that participate in any phase of the Medicaid program. See Hospital Association of New York State v. Toia, 577 F.2d 790 (2d Cir. 1978).[5/] Thus, "in this case the threshold fact of

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5/ In Toia, the Second Circuit was confronted with a claim made by a hospital association that its members should be permitted to recover retroactive monetary relief from New York even though Congress had repealed the compulsory Eleventh Amendment waiver provision and New York had withdrawn its earlier consent-to-suit in federal court. The court held that without the consent-to-suit provision and New York's compliance with (footnote continued)

congressional authorization to sue a class of defendants which literally includes the States is wholly absent."[6/] Edelman, 415 U.S. at 672.

5/ continued
it, the federal district court could not have entertained the action. 577 F.2d at 795-96. While Toia does not represent a direct conflict with the Fifth Circuit's decision in this case, it is a strong indication that the Second Circuit would have concluded that, in the absence of congressional abrogation of Eleventh Amendment immunity, Florida is not amenable to suit in federal court for retrospective monetary relief.

6/ It is instructive to contrast the position taken by Congress regarding the relationship of the Eleventh Amendment and Title XIX with Congress' decision to abrogate Eleventh Amendment immunities in actions under Title VII of the 1964 Civil Rights Act by authorizing federal courts to make back pay awards to employees of state government units that have violated Title VII. In Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976), the Court held that Eleventh Amendment immunity is limited by the enforcement provisions of Section 5 of the Fourteenth (footnote continued)

B. The Contract Executed By The Florida DHRS With Skilled Nursing Care Providers Does Not Constitute A Waiver Of Florida's Eleventh Amendment Immunity.

The Florida DHRS drafted and executed a contract with providers of skilled nursing care which defines the responsibilities of the Florida DHRS and the providers in the administration of the Florida skilled nursing care Medicaid program. The sixth paragraph of the contract provides:

6/ continued

Amendment upon which Congress relied when it extended coverage of Title VII to state employers. The Court observed that when it acts pursuant to Section 5, Congress has plenary legislative authority to enforce the substantive provisions of the Fourteenth Amendment and it may employ that power to abrogate the states' Eleventh Amendment immunity. The scope of the congressional prerogative under Section 5 to regulate state activities and to annul Eleventh Amendment immunity is significantly greater than that provided under Article I. 427 U.S. at 456. See also Hutto v. Finney, 437 U.S. 678 (1978).

> Both the provider and the Single State Agency hereby agree to recognize and abide by all state and federal Laws, Regulations, and Guidelines applicable to participation in and administration of, the Title XIX Medicaid Program.

The Fifth Circuit grasped this language to support its conclusion that, by entering into the provider contracts, the Florida DHRS expressly waived Florida's Eleventh Amendment immunity and "consented to suit in federal court regarding any action by providers alleging a breach of these laws." Florida Nursing Home Ass'n., 616 F.2d at 1363. Through its analysis of the legal effect of the contract provision, the Fifth Circuit attempted to resolve the question of what kind of state action can be viewed as a waiver of Eleventh Amendment immunity.[7/]

[7/] As the Fifth Circuit notes, by giving the Florida DHRS the right to sue and be sued, Florida has consented to actions brought by health care service providers in its own courts. Such a policy, however, has no impact on the preservation of the state's Eleventh Amendment immunity. Trotman v. Palisades Interstate Park Commission, 557 F.2d 35, 40 (2d Cir. 1977); Martin v. University of Louisville, 541 F.2d 1171, 1174-76 (6th Cir. 1976).

As the amici have previously noted, this Court has established very clear guidelines for determining whether a state has acted to waive its Eleventh Amendment immunity. It has rejected any form of constructive consent as a ground for finding that a state has waived the constitutional protection afforded by the Eleventh Amendment. Edelman, 415 U.S. at 673. Cf. United States v. King, 395 U.S. 1, 4 (1969); Soriano v. United States, 352 U.S. 270, 276 (1957). Moreover, the Court has created an imperative standard which requires that, before a federal court may determine that a state has waived its Eleventh Amendment immunity, the court must find unequivocal language or "overwhelming implications" in the text of an act of the state legislature which manifests a definitive intention to abrogate Eleventh Amendment immunity. Edelman, 415 U.S. at 673; Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 458, 466-69 (1945); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 51-52 (1944); Murray, 213 U.S. at 171-72; Smith v. Reeves, 178 U.S. 436, 445-46 (1900).

The Fifth Circuit's decision in this case failed to apply correctly these principles and its analysis of the contract provision in question suffers from the same defective reasoning that led the Court of Appeals in Edelman to its erroneous conclusion. The Seventh Circuit's decision in Edelman (Jordan v. Weaver, 472 F.2d 985 [7th Cir. 1973]), rested in large measure upon its

conclusion that Illinois, through its participation in the Aid to the Aged, Blind and Disabled program (also a federal-state cost sharing welfare plan) agreed to comply with federal statutes and regulations and thereby consented to suit by private parties seeking retrospective enforcement of federal regulatory requirements. The Fifth Circuit reaches a similar conclusion through its interpretation of the contract provision requiring the Florida DHRS to comply with federal law relating to the administration of the Florida Medicaid program. Like the Seventh Circuit, the Fifth Circuit mistakenly concluded that the acknowledged intention of a state or its social service agency to act in accordance with federal law constitutes waiver of Eleventh Amendment immunity. As this Court observed in Edelman, a state's intention to conform with federal law is at best constructive consent by the state to the abandonment of its Eleventh Amendment immunity. 415 U.S. at 673. Constructive consent, however, is insufficient to effect a surrender of constitutional rights including the protection afforded the states by the Eleventh Amendment.

The Fifth Circuit is wrong. The contract provision does not constitute "a clear declaration of the state's intention to submit its fiscal problems to other courts

than those of its own creation."[8/] Great Northern Life Ins. Co., 322 U.S. at 54, quoted with approval in Edelman, 415 U.S. at 673.

8/ In a case recently decided by the Chief Judge of the United States District Court of Minnesota, the plaintiff health care providers argued that they were entitled to recover retrospective monetary damages from Minnesota because the Minnesota Department of Public Welfare through its regulations and its contract with the providers agreed to comply with federal law in administering the Minnesota Medicaid program. In its opinion, the court reviewed the Fifth Circuit's decision in this case, but declined to follow it even though the two cases bear a close factual resemblance. In contrast to the Fifth Circuit, the District Court held that the state's agreement to comply with federal law did not constitute an express declaration of intent to waive Eleventh Amendment immunity. Minnesota Association of Health Care Facilities v. Minnesota Department of Public Welfare, No. 3-77-467, Slip. Op. at 5-6 (D.Minn. Oct. 15, 1980).

C. The Florida DHRS Lacks Authority To Waive Florida's Eleventh Amendment Immunity.

In its decision that the Florida DHRS, by drafting and executing the contract with providers of skilled nursing care, waived Florida's Eleventh Amendment immunity, the Fifth Circuit neglected to consider the authority of the Florida DHRS to waive the constitutional protection afforded by the Eleventh Amendment. The authority of an administrative or executive department to waive sovereign immunity on behalf of a state has long been recognized as a question of state law. Ford Motor Co., 323 U.S. at 467. The issue, therefore, is most appropriate for resolution in the first instance by the state courts. Id. See also Scott v. Board of Supervisors, 336 F.2d 557, 558-60 (5th Cir. 1964).

Waiver of Florida's sovereign immunity is governed by Article X, Section 13 of the Florida Constitution which provides:

> Suits against the State.-
> Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

The Supreme Court of Florida has interpreted this constitutional provision to require "specific, clear, and

unambiguous language in a statute to constitute a waiver of sovereign immunity." Manatee County v. Town of Longboat Key, 365 So.2d 143, 147 (Fla. 1978). The Florida Legislature has not abrogated Florida's Eleventh Amendment immunity, nor has it specifically delegated to the Florida DHRS the power to do so. Only one conclusion can be drawn from the Florida Constitution and its interpretation by the Florida Supreme Court: the Florida DHRS lacks authority under Florida law to waive the state's Eleventh Amendment immunity. Therefore, even if the Florida DHRS contract with skilled nursing care providers could be construed to include a waiver of immunity provision, which the amici contend that it cannot, the Fifth Circuit should have held this provision void as a matter of state law.

II. Florida May Not Be Required To Pay Retrospective Monetary Relief Under The Medicaid Act Since Federal Reimbursement For Such An Expense Is Unavailable.

Title XIX creates a cooperative program of shared financial responsibility in which contributions are made by both the federal government and participating states. Harris v. McRae, __ U.S. at __, 100 S.Ct. at 2684. After reviewing the basic cost-sharing format of Title XIX, this

Court, in Harris v. McRae, held that "Title XIX does not obligate a participating State to pay for those medical services for which federal reimbursement is unavailable." __ U.S. at __, 100 S.Ct. at 2684.

The rule announced by the Court in McRae is critical to determining whether Florida can be required to pay retrospective monetary damages to providers of skilled nursing care. The circumstances of this case bear a close resemblance to those obtaining in McRae where federal funding to assist states in making reimbursement for Medicaid abortion services had been prohibited by Congress. Here, federal contributions to assist Florida in making payments for the retrospective damages approved by the Fifth Circuit are not available because there is no federal appropriation from which such funds can be taken. The Departments of Labor and Health, Education and Welfare Appropriations Act, 1977 Pub.L. No. 94-439, 90 Stat. 1429 (1977),[9/] authorized federal financial

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9/ The 1977 Appropriations Act provided in pertinent part:

> In the administration of titles I, IV (other than part C thereof), X, XIV, XVI, XIX and XX,

(footnote continued)

contributions only if a satisfactory state plan had been submitted within the applicable time period, a precondition not met by Florida because its conforming state plan was not submitted until December, 1977. As with its failure to provide federal financial contributions for Medicaid abortions (a controlling factor in McRae), Congress has declined to appropriate a federal contribution for Medicaid services rendered prior to the submission of a satisfactory state Medicaid plan. Therefore, in accordance with the McRae decision, Florida has no substantive liability under Title XIX for payment of retrospective relief to health care providers.

9/ continued

respectively, of the Social Security Act, payments to a State under such titles for any quarter in the period beginning July 1, 1976 and ending September 30, 1977 may be made with respect to a State plan approved under such title prior to or during such period, but no such payment shall be made with respect to any plan for any quarter prior to the quarter in which a subsequently approved plan was submitted.

Furthermore, the unavailability of federal funds to help defray the cost of increased reimbursement for health care services rendered prior to the District Court's decision in this case has an important impact on the Fifth Circuit's conclusion that Florida waived its Eleventh Amendment immunity. Under no other circumstances would the state be required to pay the entire cost of reimbursement for Medicaid services. Mindful of this onerous burden, the Florida DHRS by merely agreeing to comply with federal law certainly did not intend to abandon Florida's Eleventh Amendment immunity when to do so would subject the state to an enormously disproportionate financial obligation. Therefore, as this Court's decision in McRae plainly indicates, the Fifth Circuit erred when it failed to consider the effect of the cooperative federal-state cost-sharing system established by Title XIX when it concluded that Florida waived its Eleventh Amendment immunity in this case.

CONCLUSION

The Court should grant the Florida DHRS petition for certiorari in this case. The Court would then have an opportunity to analyze the substantive issue of Eleventh Amendment immunity in the Title XIX setting and to determine what specific action must be taken by a state to waive this important constitutional protection.

Moreover, this case offers the Court an opportunity to avert the exceedingly adverse impact of the Fifth Circuit's decision on the administration of the Florida Medicaid program and the programs of many other states.

For all these reasons, then, the amici states urge the Court to accept this case for plenary consideration and issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review its judgment in the case of Florida Nursing Home Ass'n v. Page.

Respectfully submitted,

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